HIMS ENTERPRISE (M) SDN. BHD. & ANOR.

v.

ISHAK SUBARI & ORS.

HIGH COURT MALAYA, JOHOR BAHRU
ABU MANSOR ALI J
[CIVIL SUIT NO. 981 OF 1985]
21 APRIL 1991

CONTRACT: *Whether agreement voidable for fraud or misrepresentation - Affirmation - Rescission - Contracts Act 1950, ss. 40, 60, 75, 76.*

The first plaintiff (P1) is a private company and the second plaintiff (P2) its managing director and Chairman. P1 owns a quarry land in Johor. On 1 March 1982, P1 entered into an agreement with the defendants to work the quarry land. Under the terms of the agreement, the plaintiffs granted the defendants licence to enter the land and remove granite. Clause 3 of the agreement provided that the defendants shall pay fees totalling RM100,000 for the licence, half payable upon signing and the balance upon completion of installation of machinery and production of the granite.

Clause 4 of the agreement states that the defendants shall pay RM5,000 per month to the plaintiffs and a stipulated sum for each cubic yard or ton of granite removed from the land. Clause 5 provides that no payment need be paid during the first 9 months from the date of the agreement. Clause 6 (e) states that the defendants would, within 9 months of the agreement, instal machinery capable of extracting granite at a minimum rate of 100 tons per hour. The plaintiffs claimed that the defendants had failed to instal the machinery as required under the agreement.

On 13 June 1983, the plaintiffs executed a charge of the quarry in favour of BPMB as security for a loan of RM2.3 million granted by BPMB to the third defendant. On 8 December 1984, the third defendant partially erected the plant, paid RM30,000 to the plaintiffs as tribute for the period of May to October 1984. From then on, the defendants paid tribute to the plaintiffs intermittently, from time to time, not regularly as stipulated in the agreement.

On 15 October 1985 the plaintiffs issued a writ against the defendants praying, *inter alia*, for an order that the agreement be set aside on the grounds of fraud and/or fraudulent misrepresentation; alternatively, for an order that the agreement be rescinded on the grounds of repudiation by the defendants.

Held:

[1] It is common ground that the third defendant had obtained the contract to build UTM and that it would want a supply of stones. The agreement between the plaintiffs and the defendants was made on terms with which the plaintiffs were familiar, as they were terms previously used by the plaintiffs in their earlier contracts; that being so, the terms contain no surprise for the plaintiffs.

[2] The plaintiffs admitted that in their several correspondence with the defendants, they had never mentioned fraud although they did complain of the defendants' delay in installing the machinery.

[3] The onus on the plaintiffs to prove fraud is high, almost equal to the onus in criminal law. In the circumstances of this case, the plaintiffs had failed to prove fraud which induced them to enter into the agreement.

[4] It is common ground that there is no misrepresentation that the third defendant was substantially involved in building UTM and that the parties had in mind to work the quarry for the supply of the required rock materials for the project. Even assuming that there was misrepresentation that the machinery would be installed within 9 months and that they were not so installed, the facts of this case showed that the plaintiffs, by agreeing to charge the quarry land as security for the loan, had certainly elected to affirm the agreement instead of rescinding it. By affirmation, it means a clear intention on the plaintiffs' part to proceed with the terms of the contract. In the circumstances, the plaintiffs' prayer for an order that the agreement be set aside on the grounds of fraud or misrepresentation is refused.

[5] With regard to the plaintiffs' prayer that the agreement be rescinded on the grounds of repudiation by the defendants, it is not disputed that the quarry had ceased to operate and that the defendants had stopped paying tributes to the plaintiffs. In view of these, notice of termination had been sent to the defendants on 10 August 1985.

[6] A party rescinding a contract is entitled, under s. 40 of the Contracts Act not only to claim damages (under s. 75 of the Act) but also for the restoration of any advantage received by the defaulting party under the contract. That being so, the third defendant is required forthwith to redeem and discharge the charge over the quarry land.

[Order accordingly.]

Cases referred to:
Simirah v. Chua Hock Lee & Anor. [1963] 29 MLJ 241 ***(foll)***
Datuk Jagindar Singh & Ors. v. Tara Rajaratnam [1983] 2 MLJ 196 ***(foll)***
Muralidhar Chatterjee v. International Film Company Ltd. [1943] AIR PC 34 ***(foll)***
Yong Mok Hin v. United Malay States Sugar Industries Ltd. [1967] 2 MLJ 9 ***(foll)***

Legislation referred to:
Contracts Act 1950, ss. 40, 66, 75, 76

Other source referred to:
Professor Visu Sinnadurai's *Law of Contract in Malaysia and Singapore* p. 665

For the 1st & 2nd plaintiffs - C.K.G. Pillay; M/s. Hassan Yunos & Co.
For the 1st & 3rd defendants - Albert Toong Yu Leong; M/s. Albert Toong & Associates
For the 2nd defendant - S. Patmanathan; M/s. Patmanathan & Co.

JUDGMENT

Abu Mansor Ali J:

By a writ of summons and statement of claim dated 15 October 1985 against the 1st, 2nd, & 3rd defendants the plaintiffs prays for the following orders:

(i) An injunction to restrain the defendants from entering upon and operating upon the said lands until the disposal of the suit or further order;

(ii) An order that the agreement herein be set aside, cancelled or annulled on grounds of fraud, and/or fraudulent misrepresentation;

(iii) An order that the agreement herein dated 1 March 1982 be rescinded on grounds of repudiation by the defendants;

(iv) Damages for breach of agreement and for fraud and/or fraudulent misrepresentation;

(v) An order that the 3rd defendant do forthwith redeem and discharge the charge over the said leasehold lands of the plaintiffs remaining charged to the Bank Pembangunan Malaysia Bhd.;

(vi) Alternatively, that the defendants do pay to the plaintiffs forthwith as tribute a sum calculated at RM25,000 per month from December 1982 to date of payment (less sums received by the plaintiff); and

(vii) Alternatively, that the defendants do provide the plaintiffs with performance bond or guarantee in terms acceptable to the plaintiffs to cover the tribute payments due for the period or term remaining under the said agreement;

(viii) Alternatively, that the defendants do provide the plaintiff with security or bank guarantee in terms acceptable to the plaintiffs for the due redemption of the plaintiffs' land now remaining charged to Bank Pembangunan Malaysia Bhd.;

(ix) Interest on damages at 8% per annum;

(x) Costs;

(xi) Further or other relief.

After hearing evidence from the plaintiff before the stage of the close of the plaintiff's case the following events took place:

(a) The plaintiff withdrew the action against the 2nd defendant and by consent the case was withdrawn against the 2nd defendant with no order as to costs;

(b) In the midst of this hearing on 21 February 1989 there was a consent order that the 1st and 3rd defendants' counterclaim against the 1st and 2nd plaintiffs be struck out as having been withdrawn by them with no order as to costs.

(c) The case against the 1st and 3rd defendants was proceeded on but the Counsel for the 1st and 3rd defendants elected to call no witness but wished to submit there is no case to answer. He was duly put to his election that is, to stand or fall on his submission as was decided by the case of *Simirah v. Chua Hock Lee & Anor*. [1963] 29 MLJ at 241.

(d) The 1st and 3rd defendants' Counsel having been made aware of the said authority took this course of action in not calling any witness for the defence and he understood the consequences of such an action and elected to submit on that basis. He then submitted a written submission. His submission was replied to by Counsel for the plaintiffs.

Defence Counsel firstly submitted that the 1st and 3rd defendants have no case to answer for the several reasons. Firstly Counsel referred to the plaintiffs' assertion in para. 6 of the statement of claim as follows:

(1) The plaintiffs' allegation in para. 6 of the plaintiffs' statement of claim that in entering into the agreement the plaintiffs were persuaded and led to so enter into the agreement by the clear misrepresentations and statements made by the defendants to the plaintiffs as particularised in para. 6 (i) thereof to the effect that the 3rd defendants have secured a multi-million contract to supply granite to University Technology Malaysia (UTM), 6 (ii) 3rd defendant on executing the agreement, would instal new machinery with the capacity to extract minimum rate of 100 tons/hour, 6 (iii) that by operating one shift/8 hours/day times 25 days output would be 20,000 tons/month, 6 (iv) that at the rate of RM1.25 per ton payable by the defendants to the plaintiffs the minimum tribute would be not less than RM25,000/month 6

(v) that installation of machinery would be soon after the agreement not later than 9 months and 6 (vi) pending the installation and extraction as in 6 (iii) plaintiffs would be paid RM5,000 as tribute monthly.

The 1st and 3rd defendants' first point of submission was that there was direct contradiction for according to the pleadings of PW1, the so-called misrepresentation came from both Wahiduddin bin Abdul Wahab and Mohd. bin Haji Ahmad while in the evidence PW1 gave he said it was Encik Mohamed bin Hj. Ahmad who represented to him. By reason of this apparent contradiction the defendants' Counsel submitted there was no representation.

Again in para. 20 of the statement of claim the plaintiffs pleaded:

> 20. Further or in the alternative the plaintiffs contend that the defendants secured the agreement from the plaintiffs by means of fraud and/or misrepresentation; fraudulent, negligent, innocent or otherwise; by reason of which the said agreement is liable to be set aside or rescinded.
>
> **Particulars of Fraud and/or Misrepresentation of the defendants**
>
> (1) falsely and dishonestly representing to the plaintiffs that they have secured a multi million dollar contract for the urgent supply of large quantities of granite for the University Technology Malaysia Campus project;
>
> (2) falsely and dishonestly representing to the plaintiffs that so soon after the execution of the said agreement or within 9 months from the date thereof in any event, the defendants would be purchasing and installing machinery at the site capable of extracting 100 tons per hour and which in turn would give the plaintiffs an income in the region of RM25,000 or thereabouts per month.

What is the evidence before the Court in order to sustain the allegations of the plaintiffs in the statement of claim? PW1, Hj. Ibrahim b. A. Majid, the 2nd plaintiff was a government pensioner. The 1st plaintiff was a private company, Hims Enterprise (M) Sdn. Bhd. (HIMS), formed by PW1 and he was the managing director and chairman of HIMS at the relevant time.

PW1 said HIMS owns a quarry land (quarry land) situated at 19 milestone, Jalan Johor Bahru/ Pontian road at Ulu Choh. It is about 35 acres in area. PW1 further says the quarry land was first alienated to him in 1974. He had it surveyed in 1980.

Then on 1 March 1982 PW1 entered into an agreement with the defendants to work out the quarry land. In fact the agreement (the agreement) is between HIMS, the 1st plaintiff of the one part and the defendants (see pp. 18-25 of enclause 102).

In the agreement HIMS is the registered licence of all 3 pieces of land approximately 19 acres and 2 roods (called the licensed quarry land) and the 2nd plaintiff is the licence of another 4 acres (TOL land). The defendants, the 2nd party and the 1st plaintiff and PW1 wanted to work all the quarry lands and was requesting the 2nd party to do so.

In clause 1 of the said agreement subject to terms and conditions contained and the payment and covenants of the 2nd party, HIMS and the 2nd plaintiff granted the defendants licence and liberty to enter the said lands and TOL land to search, dig and remove granite in whatever form therefrom. Under clause 1(a)(i) the licence granted to 2 pieces of land HS(D) for MLO 3790 and HS(M) 355 for MLO 3791 shall be for one (1) year from the date of the agreement. Under clause 1(a) (ii) in respect of the said land HS(M) 1013 for Lot 3622 shall be for a period of 10 years commencing from the date of the agreement and under clause 1(b) the licence granted for the TOL land for the unexpired period provided that upon the expiration of the leases of the said lands and the expiration of the temporary occupation licences the

1st party shall apply to the relevant authorities for renewal of a further 10 years and one year in respect of the said leases and the said TOL and shall grant the same to the 2nd party on the same terms.

By clause 3 the parties agree the fees payable for the grant of the said licence shall be RM100,000, RM50,000 payable on signing the agreement and the balance of RM50,000 on completion of the machinery and on production of the granite. The RM50,000 is refundable to the 2nd party if for any reason the 2nd party is unable to carry on through no fault of the 2nd party.

Then by clause 4 the 2nd party was to pay before the 7th of each month:

(a) RM5,000 per month;

(b) RM1 per cubic yard or RM1.25 per ton of granite in whatever form removed from the said lands during the previous month with the exception of granite waste or dust.

In clause 5 the 1st party agrees to waive payment of the aforesaid tribute by the 2nd party for the period of nine (9) months commencing from the date of this agreement. Clause 6 of the agreement pertains to covenants not to remove granite for the 9 months without 1st party's consent and the usual clauses pertaining to 2nd party's obligation to pay rates and taxes and being good tenants and giving indemnity against claims to the 1st party and that the 2nd party would observe all prevailing regulations but in clause 6 (e) thereof the 2nd party covenants that within 9 months from the date of the agreement the 2nd party will instal a new machine capable of extracting granite at a minimum rate of 100 tons per hour of main crusher/plant.

In his evidence PW1 said in 1980 he obtained a geological survey for his quarry. Then in early 1982 he started to look for interested persons to work his quarry and one such person was the 1st defendant Ishak b. Subari. The 1st defendant came and PW1 gave him an option letter. The 1st defendant then brought the 2nd defendant Azman bin Misni. Both of them mentioned that Kobena was interested to work the quarry. There was a lengthy discussion and at their suggestion PW1 agreed to go to Kuala Lumpur to negotiate with Kobena officials.

PW1 said further in the middle of February 1982 he went to Kuala Lumpur and met the 1st and 2nd defendants, and together they went to Kobena office to meet first Encik Mohamed bin Hj. Ahmad the general manager of the 3rd defendant. Then they all met the 3rd defendant's managing director Encik Mohd. Wahiduddin bin A. Wahab. As directed by En. Mohd. Wahiduddin they held further negotiation with Kobena which was represented by En. Mohamed bin Hj. Ahmad. PW1 alleged that during the course of the negotiation PW1 said En. Mohamed bin Hj. Ahmad represented to him what are contained in the terms of the agreement of 1 March 1982. In the course of the said negotiation PW1 alleged that Encik Mohamed bin Hj. Ahmad and the 2nd defendant showed PW1 a newspaper cutting dated 30 January 1982 to prove to PW1 the University Technology Malaysia's (UTM's) project to be carried out. Apart from the cutting 1st defendant also showed him two photocopies of letters from the firm of Hargill Malaysia dated 18 January 1982 and 19 January 1982 (pp. 9-14 and pp. 15-17 of enclause 102) which letters were quotations to the 1 defendant pertaining to quotations for the supply, installations and delivery of machinery together with crusher.

During the course of the negotiation PW1 also alleged 2nd defendant also gave him copies of draft working paper which he had prepared for the quarry operation (see pp. 27-37 of encl. 102). PW1 went to elaborate, in his evidence on oath when he said at p. 28 thereto

Kobena had been awarded a contract to build UTM in Johor Bahru. Then he said at p. 30 thereof the production machinery of the plant and at p. 35 thereof sets out the tribute to PW1 and also in that page PW1 would get RM315,000 in the first year of production. PW1 further said before signing the said agreement dated 1 March 1982 he had sight of these matters. He stressed that pp. 18-25 of encl. (102) set out the representations made to PW1 leading him to execute the agreement.

PW1 also stated in evidence that the agreement of 1 March 1982 was from his own draft and it was prepared in Kuala Lumpur by Kobena lawyers. He executed the agreement in the office of Kobena lawyers.

PW1 then said Kobena failed to install the crusher within the 9 months as agreed. He used to contact Kobena's general manager En. Mohamed b. Hj. Ahmad, also the 2nd defendant, an employee of Kobena and employed by them as a quarry manager at Johor Bahru who promised to look into the matter.

PW1 also said the 2nd defendant told him he had spoken to En. Wahiduddin and PW1 was told that Kobena required an extension of time to install the machinery which extension he granted on the assurance of Kobena that PW1's losses would be made good once the crusher plant was installed and its production was under full capacity. PW1 in fact gave two extensions, the last one expiring on 30 April 1984 (see p. 121 of encl. (102) *vide* letter dated 19 November 1983).

As a matter of fact PW1's support for the quarry project went even further for when Kobena could not install after the extension PW1 did allow Kobena to charge his land to Bank Pembangunan for RM2.3 million as security for a loan to Kobena. The charge was on 13 June 1983 and executed by HIMS (see pp. 104-115 of encl. 102) as the land belonged to HIMS.

PW1 said on 8 December 1984 Kobena partially erected the plant and PW1 was not sure when it installed the plant after the loan but he said Kobena started to pay PW1 and did pay him tribute on 8 December 1984 for RM30,000 for tribute from May 1984 to October 1984. This was according to the agreement. Kobena however did not pay tribute from December 1982 to December 1984 for 2 years to either PW1 or HIMS.

PW1 said from his knowledge that Kobena completely installed the plant on 18 February 1985 (see p. 247 of encl. 102). For January 1985 PW1 received a further RM5,000. From then to May 1985 PW1 received the minimum monthly payment. Kobena also started to make payment based on production from February 1985 to May 1985. The total production was according to the Weighbridge docket with particulars. After May 1985, however, PW1 was not supplied with such docket although he asked. The development from September 1985 was that Kobena refused to give docket and it stopped using the Weighbridge but from June 1985 to March 1986 the 1st plaintiff continued to be paid the minimum tribute of RM5,000 per month.

PW1 also testified that from January 1986 Kobena began to pay them on production by deducting quarry waste and dust which according to PW1 belonged to the plaintiffs which quarry dust fetched RM6 per metric ton and as for quarry waste at RM3.50 per metric ton.

It appeared according to PW1's evidence that Kobena only paid HIMS tribute until November 1986 and it did not pay for December 1986 to March 1987. Then Kobena paid tribute for April 1987 on 15 May 1987 and the next payment for July 1987 for RM17,204.17 was paid on

8 July 1987. This was the last payment and up-to-date of hearing no payment was received from Kobena but during that period of 15 months when nothing was paid, according to PW1, Kobena was working the quarry.

PW1 said that after installation of the plant he visited the quarry about twice a week. His representative Basri bin Hussin was present at the site on all working days and he reported to him regularly on what happened at the site.

What transpired later when PW1 and HIMS were not regularly paid was that he contacted Kobena's new General Manager En. Markali Sher Mohamed who promised payments of tribute to himself and HIMS and since 2-3 years elapsed with no payment, PW1 then discussed the matter with the former director Datuk Zakaria b. Sulong to seek the advice of Counsel to have the agreement rescinded. PW1's solicitors sent a notice on 10 August 1985 (see pp. 209-211 of encl. 102).

PW1 admitted that he did enter into a settlement with the defendants on 11 April 1987 and consent order was obtained but the defendant only partially complied with it.

PW1 also calculated that his total claim from 1 March 1982 (9 months of waiver) to October 1982 (9 months) and with effect from December 1982 to October 1988 (71 months) at the rate of RM25,000 per month would be about RM1.8 million. What Kobena had paid was only RM246,498.91. The land having been charged to Bank Pembangunan, and the bank is calling for their interest to be paid up almost amounting to ½ a million or else the land would be forfeited.

The issue before this Court was whether PW1 and the plaintiffs were induced to enter into the agreement of 1 March 1982 by misrepresentation?

It is pertinent to say who PW1 was that the defendants contracted with. PW1 said before he went into the quarry business and before he retired on 1 January 1972 he was under Secretary Johor' the equivalent of the present Deputy State Secretary. After retiring he went into quarry business. Prior to the granting of the lease to the defendants from 1975 to 1976, PW1 operated the quarry with a certain party he could not give the name. After that a second party took over the operation of the quarry from the first party after having negotiated terms. This second party continued to work the quarry until 1979. The first party ceased because there was not much demand for crushed stones. The first group also agreed to pay RM5,000 per month. They however did ask for reduction to less than RM25,000.

As regards the second party it took over from the 1st party on the same terms paying him RM5,000 per month. They were using the same crusher and they were to replace it after 9 months but they failed to do so. PW1 said apart from these two groups, a third group showed interest but it did not get off the ground. So much for PW1's experience in quarry negotiations and operation. So it is quite accurate and indeed there was much truth when PW1 said of his contract with the defendants that the agreement was "following my own draft" though it was prepared again and signed before Kobena lawyers in Kobena lawyers' office. In cross-examination PW1 said Kobena agreed to the terms and conditions of his draft which he took from previous 3 contracts.

The Court, however, caught PW1 in a lie when he said that it was the working papers that led him to sign the agreement. It is crystal clear from the opening words of the working papers "on 1 March 1982 an agreement was made between HIMS Enterprise (M) Sdn. Bhd., Hj. Ibrahim bin A. Majid and Kobena, Ishak Subari and Azman Misni ... " that when this working paper was prepared the agreement was already well signed.

It is a fact well established and it is common ground that the 3rd defendant had obtained the contract to build the UTM and it is no exaggeration and easy to see that the 3rd defendant would want a supply of stones. When the defendants contracted with the plaintiffs on those terms they were terms with which PW1 was familiar with and had inserted in his previous contracts and for him they can contain no surprise. From the events in the relationship of the plaintiffs and the defendants, true there was a slight delay in erecting of the plant but most importantly, the plaintiffs eventually went along to perform the contract and to receive the succeeding tributes until the time the defendants stopped paying and hence the filing of this action.

In cross-examination PW1 concurred that at the time of signing the agreement he had no complaint of the terms and content of the agreement.

He also said in cross-examination that when the agreement was signed on 1 March 1982 it was normal practice to pay 10% to the persons who were termed as brokers who got the deal through. When the deal went through Kobena was prepared to pay RM100,000 and when, indeed, he was paid that RM100,000 he in turn paid Azman Misni and Ishak Subari RM5,000 each. He gave RM2,500 each first in early March (1982) and the balance of RM2,500 a few months after that.

PW1 further confirmed in cross-examination his understanding that his pleadings in the statement of claim para 20 (p. 7 of bundle 104) contained "fraud and/or misrepresentation" and he understands fraud to mean someone telling something which is not true. It involves some kind of dishonesty and it is a serious matter.

Knowing that the matter was serious he said he wrote to Kobena several times complaining that they did not keep to the terms and conditions of the agreement in particular:

(a) They did not install the 100 tons crusher within the 9 months as in the agreement (extensions given and commenced only on 18 February 1985);

(b) When crusher was not installed there was no granite production and so he did not receive his alleged RM25,000 per month.

PW1 admitted that in all these relevant letters he never mentioned the word fraud. It is also correct that the letters (see pp. 209-211 of encl. 102) were from his solicitors acting on his instructions to all the three defendants. When he was pressed further he agreed that the correct assessment of his claim did not include fraud but he urged that from these letters fraud may be implied and the letters do imply that, he said.

The Court also noticed that PW1's allegation of fraud was according to him, to be found when the defendants asked the plaintiff to provide security for the defendants' application of a loan of RM2.3 million from Bank Pembangunan in order to install the crusher plant, 9 months or more than one year after signing of the agreement which matter was brought for the decision of the 2nd plaintiff's board. PW1 said the loan of RM2.3 million was not used to buy a crusher only but it was also used to buy a Weighbridge. This according to PW1 was fraud as PW1 held it was wrong of Kobena to use part of the proceeds of the loan to buy a Weighbridge. PW1 said it was understood that the loan was only to purchase a crusher plant and accessory. But in his evidence PW1 admitted that the working paper p. 27 @ p. 34 of encl. (102) gave a list of machinery and costs and No. 11 of the list did say Weighbridge. He relented and he agreed that the letter dated 11 April 1983 spoke of the loan "to carry out quarry project" (see p. 73) of encl. (102) and PW1 agreed was wide enough to cover the said loan. PW1 also did not protest when getting this letter dated 11 April 1983 that the loan was misused.

The other alleged fraud or misrepresentation according to PW1 was when he was shown a paper cutting (see p. 380 of encl. (102) that Kobena was interested in his quarry as Kobena was involved in building the University Utara campus. PW1 said he was also induced by the working paper giving quotations pp. 9, 10, 11-17 of encl. (102) dated 18 January 1982 and letter from Hargill Malaysia dated 18 January 1982. Regarding this matter PW1 agreed there is no falsity as it was common ground that Kobena had a substantial contract to build University Technology Malaysia and PW1 agreed there is no fraud in the letters of Hargill Malaysia.

My task is to rule on the submission of no case to answer made by the defendants' Counsel. When the plaintiff alleges fraud, on several authorities like *Datuk Jagindar Singh & Ors. v. Tara Rajaratnam* [1983] 2 MLJ 196, the onus on the plaintiff to prove fraud is a high one almost equal to the onus in criminal law.

Having this onus in mind, I find the plaintiff has failed to prove fraud that induced him to enter into this agreement.

The plaintiff was a considerable experienced administrator who as stated, rose in government service to the position to what would be now Deputy State Secretary. To add to that he had also considerable experience in quarry work having leased this very same land for rock excavation twice previously. The draft in which the present agreement was based on his own draft spelling out terms which he previously asked for from previous contractors. With this background how he could come to Court to say that the defendants had committed fraud on him is beyond belief. I have no hesitation in making a finding that the plaintiff went to contract with his eyes open and I rule he cannot avoid this contract on the ground of fraud.

As regards the plaintiff's allegation of misrepresentation that he was induced to contract because the 3rd defendant had obtained a substantial contract to help build the University Technology Malaysia.

It is common ground of both plaintiff and defendants that there is no misrepresentation that the 3rd defendant was substantially involved in building the said university and it was fair to say that the parties had in mind to work the said quarry for the supply of the required rocks material in the building of the campus of the university. Clearly therefore there is no misrepresentation on this score. I make the finding that there is no such misrepresentation.

The above being the case I cannot find any evidence that there has been fraud or misrepresentation on the part of the defendants.

Assuming that I may be wrong that there was misrepresentation that plant and machinery were to be installed in 9 months and they were not so installed, the plaintiffs, by giving the permission to the 3rd defendant to charge HIMS' land had certainly elected to affirm the agreement instead of rescinding it. That affirmation was, not only did the plaintiff agree to give the property as security but also agreed to further extension up to 30 April 1984 after the security was charged by HIMS on 13 June 1983. I therefore uphold the submission of the 1st and 3rd defendants that there was no fraud or misrepresentation.

By affirmation it means a clear intention on plaintiff's part to proceed with the terms of the contract.

In prayer under (ii) the plaintiff prays for:

(ii) An order that the agreement herein be set aside, cancelled or annulled on grounds of fraud, and/or fraudulent misrepresentation and then in prayer

(iii) which is not even an alternative prayer the plaintiff claims:

(iii) An order that the agreement herein dated 1 March 1982 be rescinded on grounds of repudiation by the defendants; and in

(iv) Damages for breach of agreement and for fraud and/or fraudulent misrepresentation.

With respect to the solicitors who formulated this claim I found this claim fraught with difficulties. Ordinarily in a claim substantially so founded on fraud and/or misrepresentation the remedy is certainly rescission and it is in order for the plaintiff to claim cancellation or annulling of the agreement, if successful, and claiming damages to be reinstated to their former positions but it is not in order to claim damages for breach of contract which contract the plaintiff does not in the first place wish to recognise and wishes to annul.

Having said the above I uphold the submission of the defendants that there is no case for the defendants to answer in respect of prayer (ii) in the said statement of claim.

The Court now goes on to consider the plaintiffs' prayer (iii):

(iii) An order that the agreement herein dated 1 March 1982 be rescinded on grounds of repudiation by the defendants.

Has this been made out by PW1's evidence? His evidence has clearly set out and it is not disputed in cross-examination that this quarry has ceased to operate. When tributes were not paid and although PW1 complained to the 3rd defendant, it eventually ground to a halt. As has been stated the non-payment of what were due and the non-performance of the agreement was the factor that led to PW1 seeing Counsel and the Counsel gave notice of termination *vide* letter dated 10 August 1985 (pp. 209-211 of encl. 102). I am of the view at about this time there was, if not abandonment almost a point of abandonment of quarry work by the defendants.

Section 40 of the Contracts (Malay States) Ordinance 1950 provides:

> When a party to a contract has refused to perform or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

The effect of this section is to render a contract which a promisor refuses to perform or disables himself from performing voidable at the option of the promisee. The plaintiffs herein had rescinded the contract by sending the letter dated 10 August 1985 because through not paying tribute and through not performing the contract according to its terms, and by subsequently altogether stopping work, the defendants had repudiated by eventually abandoning work completely.

I therefore overruled the defendants' submission of no case to answer and find that the plaintiffs have succeeded in respect of their prayers (iii) and (v) in the statement of claim.

When a contract is rescinded under s. 40 of the Contracts (Malay States) Ordinance 1950, it was held in *Muralidhar Chatterjee v. International Film Company Ltd.* [1943] AIR PC 34 and followed by the Federal Court in *Yong Mok Hin v. United Malay States Sugar Industries Ltd.* [1967] 2 MLJ 9 that a party rescinding the contract under s. 40 of the Contracts Act is entitled not only to claim damages under s. 75 of the Contracts Act but also for the restoration of any advantage received by the defaulting party under the contract by virtue of the provisions of s. 66 of the Contracts Act. In p. 665 of Professor Visu Sinnadurai's *Law of Contract in Malaysia and Singapore* the learned author commented "that the application of ss. 66, 75 in cases of rescission under s. 40 of the Contracts Act is not correct". The learned author says the correct provision is s. 76:

A person who rightly rescinds a contract is entitled to compensation for any damages which he has sustained through the non-fulfillment of the contract.

Be that as it may this Court holds that the plaintiffs are entitled to damages in sums to be separately assessed on a date to be fixed.

I therefore enter judgment for the plaintiffs in respect of prayer (iii) in the statement of claim and order that the agreement dated 1 March 1982 be rescinded. I also give judgment in terms of prayers (v) of the statement of claim that the 3rd defendant do forthwith redeem and discharge the charge over the said leasehold lands of the plaintiffs remaining charges to Bank Pembangunan Malaysia Bhd., if not already discharged with liberty to plaintiffs to apply in respect of consequential damages and/or consent order, if any.

Also found at [1992] 1 CLJ 132